

OSPREY RIVER TRIPS, INC.

IBLA 84-259

Decided October 1, 1984

Appeal from decision of the Grants Pass Area Manager, Oregon Bureau of Land Management, suspending commercial outfitter's permit MRP-83-56.

Affirmed.

1. Administrative Procedure: Administrative Review -- Federal Land Policy and Management Act of 1976: Permits -- Public Lands: Special Use Permits -- Special Use Permits

The exercise of Secretarial discretion involved in the issuance of special use permits includes the authority to set permit conditions and establish penalties for violation of permit conditions. A temporary suspension of a permit imposed by the authorized officer for violations of permit conditions is found to be proper where it is shown the permit holder failed to make required reports and failed to mark boats to identify the permit holder as required by the permit conditions.

APPEARANCES: Bruce B. Naglee, Osprey River Trips, Inc., for appellant; Hugh R. Shera, District Manager, Medford District, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Osprey River Trips, Inc. (Osprey), conducts a river boat excursion business on the Rogue River and its tributaries in Oregon under the terms of special recreation permit MRP-83-56, dated April 5, 1983. On November 25, 1983, the Area Manager, Grants Pass Resource Area, Oregon Bureau of Land Management (BLM), suspended Osprey's commercial outfitters permit which authorizes use of the "Wild Section" of the Rogue River. The term of the suspension was for 2 weeks, from September 4 to September 19, 1984. 1/ The stated reason

1/ The imposition of the ordered suspension was stayed, pending appeal, pursuant to provision of 43 CFR 4.21(a). Future cases, however, may not be accorded this treatment. See 49 FR 34338 (Aug. 29, 1984), providing a new section 43 CFR 8372.6(b), which creates an exception to the general

for the suspension decision was three reported violations of permit stipulations, said to have occurred on August 26, September 9, and October 1, 1983. Osprey concedes, on appeal, that the August 1983 violation did occur, consisting of carrying more passengers than scheduled in a single trip. It points out, however, that it was penalized for the August violation by earlier BLM action which resulted in cancellation of another scheduled Osprey trip. As to the September and October 1983 violations, however, Osprey challenges the BLM determination on factual grounds.

The September 1983 violation is described by BLM as: "[F]ailed to fill out and deposit a trip validation card at Rand prior to launch. Also failed to cover up 'Mariah' on some of the boats used as per telephone agreement with BLM." The October violation cited by BLM also involves use of improperly marked boats and failure to file a prior trip report with BLM. Osprey denies that the Rand station was open for business on September 9, when the Osprey guide attempted to report her departure. Osprey, explaining the guide was inexperienced, states the report was filed later on the same day. While admitting that some items of equipment were marked "Mariah" (instead of "Osprey"), Osprey contends the boats themselves were properly marked. As concerns the October 1983 trip, the facts concerning reporting and craft identification are conceded to be correctly stated by BLM.

BLM disputes Osprey's explanation of the events of September 9, 1983; concerning this trip by the outfitter, BLM states:

The Rand Visitor Center was in fact open by 7:00 a.m. on September 9, 1983. Ken Vines, an employee of the U.S. Forest Service, opened the office that morning and has assured this office that he was there no later than 7:00 a.m. He also stated that to the best of his knowledge no one from Osprey River Trips Inc. stopped by the office that morning.

Andrea Beardsley, the Osprey head guide for this trip, stated to Tom Dew of the Medford District Office several days after the trip launched that she was unaware that completed trip validation cards were required for trips taken after the regulated period.

The permit requirements concerning "trip validation cards" are listed on page 3 of the "Special Provisions and Requirements" attached to each outfitter's permit. This requirement states that:

fn. 1 (continued)

rule at 43 CFR 4.21(a) by providing that, in cases involving recreational permits, the decision of the authorized officer will not be stayed by an appeal. As matters now stand, however, Osprey's period of suspension is not to be effective until September 1985, according to a notice furnished by BLM to appellant in response to inquiry about the effect of appeal in this case.

During the non-regulated period (between Labor Day and the Friday preceding Memorial Day), all Authorized Outfitters must continue to register at the Rand Visitor Center permit office and complete a trip validation card. If this office is not open, the Medford District Office, Rogue River Resource Area, must be notified, and the cards must be received in the Medford BLM District Office within 10 days after the launch date.

It is the responsibility of the permittee to ensure that all of its employees or sub-contractors are thoroughly knowledgeable concerning the permit restrictions, special provisions, requirements, and all other rules or regulations that may affect the outfitter's business on public lands or waters.

It was also stated by Osprey that the trip card "was then turned in at the completion of the trip by Osprey." This card was not received by the Medford District Office until September 20, 1983, after we had requested that Osprey turn it in.

Osprey states that all craft were clearly identified with the name "Osprey" as agreed to with Medford District personnel. A seasonal river ranger working at the Grave Creek boat ramp on September 9, 1983, noted in an incident report that of the six rafts in the party, one was identified with the name "Mariah" on the side and another had the letters "MWE" (Mariah Whitewater Expeditions) on the side. She also stated that "many of the paddles and lifejackets were marked "Mariah." This was directly contrary to agreements made between Osprey, Mariah, and the District Office in phone conversations prior to September 9, 1983.

It was noted that Osprey did not depart the Grave Creek boat ramp until approximately 2:00 p.m. on September 9, 1983, according to the BLM river ranger on duty at the ramp. Even if they had departed Rand prior to the office opening, they could have easily driven back to Rand prior to departure and had the trip card validated.

Osprey had four different methods to comply with the trip validation card requirement:

1. Check into Rand after 7:00 a.m. and have the card signed (office was definitely open by 7:30 a.m., the time that they state they were at Rand).
2. Use the drop box provided on the outside of the building that is used for early or late departures.
3. Drive back from Grave Creek to Rand (approximately 5 miles) and have the trip card signed prior to their departure.

4. Notify the Medford District Office that they would be departing prior to 7:00 a.m. and therefore unable to have the trip card signed.

(BLM Response at 1, 2).

Thus, the explanations of the background of this case by the parties establish this situation: Osprey admits that some of the violations charged did occur, but explains they involved minor permit infractions. Osprey also denies that some of the infractions occurred in the manner charged by BLM. BLM provides a detailed account, however, which, by reference to circumstances attending the September 9 departure, establish that rule infractions did occur as claimed. It is apparent, and this Board finds as a fact, that violations of the permit terms did occur, and that they were "minor" in nature as found by BLM, involving failure by Osprey to properly mark some boats used and failure to report specific trips taken in a timely fashion, on September 9 and October 1, 1983.

[1] Osprey asks that the penalty imposed by BLM be commuted from suspension to "a monetary fine." While the violations committed during 1983 were "minor violations," the penalty of suspension was imposed because the violations were repeated and because the regulations only allow BLM to impose penalties consisting either of suspension or reduction of the permit. See 43 CFR 8372.5 (1983). The pertinent "Special Provisions and Conditions" to appellant's permit provide only for various methods of "reduction or suspension" of Osprey's permit in the event of violation of the permit terms.

Special use permits are issued under the general authority of the Secretary of the Interior to regulate the use of the public lands pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) and (c) (1982). Special recreation use permits are authorized under provisions of 43 CFR Subpart 8372 (1983). The permit issued to Osprey was subject to those regulations and obliged the permittee to abide by special stipulations attached to the permit. Pertinently, 43 CFR 8372.3 (1983) establishes that "issuance of a recreation permit is discretionary with the authorized officer." Included in this discretionary authority is the authority to set permit conditions and provide for penalties if the conditions are violated. See 43 CFR 8372.5(a). Failure to timely report excursions actually taken and to mark boats so as to permit easy identification are violations of stated permit requirements. See Special Recreation Application and Permit MRP-83-56. Osprey has not demonstrated that the restrictions imposed by the permits were not reasonably required to enable BLM to manage the river's use pursuant to law. The imposition of a penalty under these circumstances was proper and within the authority of the agency to impose.

Since the time of decision the applicable permit regulations at 43 CFR Part 8370 have been amended, effective September 28, 1984, 49 FR 34332 (Aug. 29, 1984). The amended rule will permit a fine to be paid, in addition to other penalties, implementing provisions of 43 U.S.C. § 1733(a) and (b) (1982). The new rule, 43 CFR 8372.0-7 (49 FR 34337) provides:

(b) Penalties. (1) Any person convicted of committing any prohibited act in this subpart, and violators of regulations or permit terms or stipulations, may be subject to a fine not to exceed \$1,000 and/or imprisonment not to exceed 12 months. (2) Authorized as well as unauthorized users may be subject to civil action for unauthorized use of the public lands or related waters and their resources, or violations of the permit terms or stipulations.

The provision of 43 U.S.C. § 1733 (1982), which this regulation implements, does not, however, contemplate imposition by BLM of a suitable penalty for "administrative violations." The statute provides, pertinently:

Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than \$1,000 or imprisoned no more than twelve months, or both. Any person charged with a violation of such regulation may be tried and sentenced by any United States magistrate * * *.

43 U.S.C. § 1733(a) (1982). In order to afford Osprey the relief from suspension which is apparently requested, therefore, a charge would need to be brought before a magistrate authorized to hear such offenses. It is apparent Osprey does not seek this sort of treatment, which would put resolution of this matter beyond BLM administrators, but intends, rather, that the imposed penalty be lessened. In actuality, Osprey seeks to negotiate more favorable treatment. Osprey has not actually consented to the imposition of the penalty provided by the amended regulation. The tenor of the statement requesting "fine" instead of suspension indicates the imposition of a penalty, as provided by 43 CFR 8372.0-7(b), is not within the contemplation of the request made.

While, generally speaking, applicants before the Department may be afforded the benefit of after-promulgated favorable rules following a Departmental action in cases where no one else will be injured by such retroactive application of the rule, it does not appear that application of the amended regulation in this case would "benefit" Osprey. See, e.g., James E. Strong, 45 IBLA 386 (1980). Although Osprey suggests a "fine" should be imposed, its arguments concerning penalty indicate it probably seeks diminishment of punishment, although it asks for a commutation from suspension to fine. Thus, Osprey argues that the selected date of suspension is unfair because it strikes at a time when Osprey expects high business volume. It is suggested that the October 1 infractions, which triggered the penalty imposed, involved a small group of tourists, and should not, therefore, be the cause of a loss of the business of larger groups. Osprey pleads its good prior record, generally, and argues that the punishment offered by BLM is grossly disproportionate to the offenses which give rise to the suspension action.

The stipulations made part of Osprey's permit provide for revocation or suspension in the event of violation of permit terms. It is apparent that Osprey, on at least two occasions, failed to report a trip in progress and also failed to mark its boats as required by the permit terms. Under

these circumstances, the decision to temporarily suspend the Osprey permit was proper. Neither at the time of decision, nor later, did BLM possess the authority to impose a "monetary fine" for the offenses charged.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

R. W. Mullen
Administrative Judge